A

IPMUDA BHD

v.

EURODEC DEVELOPMENT AND CONSTRUCTION SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[SUIT NO: D4-28-796-2005]
9 SEPTEMBER 2008

C

COMPANY LAW: *Winding up - Proof of debts - Interest on debts - Whether ought to be capped to 6% per annum - Legislation applicable to proof of debts - Inconsistency between subsidiary legislation and Act - Companies Act 1965, s. 291(2) - Bankruptcy Act 1967, s. 43(6) -*
D *Companies (Winding-up) Rules 1972, r. 87 - Interpretation Acts 1948 and 1967, s. 23*

BANKRUPTCY: *Interest - Interest on debts - Whether ought to be capped to 6% per annum - Legislation applicable to proof of debts -*
E *Inconsistency between subsidiary legislation and Act - Companies Act 1965, s. 291(2) - Bankruptcy Act 1967, s. 43(6) - Companies (Winding-up) Rules 1972, r. 87 - Interpretation Acts 1948 and 1967, s. 23*

STATUTORY INTERPRETATION: *Interpretation Act - Application*
F *to subordinate legislation - Inconsistency between subsidiary legislation and Act - Companies Act 1965, s. 291(2) - Bankruptcy Act 1967, s. 43(6) - Companies (Winding-up) Rules 1972, r. 87 - Interpretation Acts 1948 and 1967, s. 23*

G This was an application by the petitioner under r. 93 of the Companies (Winding-up) Rules 1972 ('Rules') to reverse or vary the decision of the Official Receiver ('OR') on a proved debt. The OR had substituted an interest of 1.5% per month given by a judgment (based on an agreed interest) with an interest of 6% per
H annum on the debt proved. The petitioner contended that the OR was wrong in capping the interest rate to 6% per annum and should instead allow the contractual interest of 1.5% adjudged by the court. He relied on r. 87 of the Rules and averred that s. 291(2) of the Companies Act 1965 ('Act'), which incorporates
I the laws on bankruptcy, was not applicable in determining the

interest rate on a proved debt. He further submitted that even if s. 291 of the Act were applicable, there was a possible conflict between the two provisions and that r. 87 of the Rules should be given precedence since it is a rule made specifically for the winding up of a company. It was contended on the OR's behalf that in allowing the proof of debt filed by the petitioner, the OR relied on s. 291 of the Act, which calls into operation the bankruptcy laws in relation to all persons who would be entitled to prove debts. By virtue of s. 291(2) of the Act, bankruptcy laws, in particular s. 43(6) of the Bankruptcy Act 1967 ('BA'), should be applied in admitting the proof of debts.

Held (dismissing the application):

(1) From s. 291(2) of the Act, it is clear that on proof of debts the bankruptcy laws governing the individual applies to the winding up of companies, and the section that governs the proof of debts in bankruptcy law is s. 43(6) of the BA. Section 291(2) of the Act is the law to be applied for proof of debts and by virtue of the same, s. 43(6) of the BA comes into operation. Section 43(6) of the BA, *inter alia*, provides for the capping of the interest rate in proof of debts to be at 6% per annum. Thus, s. 291 of the Act read together with s. 43(6) of the BA becomes the law applicable to proof of debts and will have the effect of capping the interest rate to 6% in a proof of debts in a wound up company. However, s. 291 read together with s. 43(6) would be inconsistent with r. 87 of the Rules. Applying s. 23 of the Interpretation Acts 1948 and 1967, r. 87, being a subsidiary legislation, cannot override s. 43(6) which applies by virtue of s. 291, both of which are provisions under Acts of Parliament. The OR had, therefore, correctly applied s. 43(6) of the BA in determining the interest on the provable debt to be capped at 6% per annum. (paras 8, 9, 13 & 14)

Case(s) referred to:

DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 CA ***(dist)***

Re City Securities Pte [1995] 3 SLR 617 ***(refd)***

Re Foong Da Realty Development Sdn Bhd ex-parte Public Bank Bhd (Company Winding up K28-31-2003) (Unreported) ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 43(6)
Companies Act 1965, ss. 218, 291(2)
Companies (Winding-up) Rules 1972, rr. 87, 93
Interpretation Acts 1948 and 1967, s. 23
Legal Profession Act 1976, s. 33(1)(h)

Bankruptcy Act 1967 [Sing], s. 40(3)
Companies Act [Sing], s. 372

For the petitioner - JK Phua (Edwin Tan with him); M/s CM Chiu & Co
For the Official Receiver - Noramirah Mohd Shafee (Siti Khamisah Khalid with her) FCs

Reported by Suresh Nathan

JUDGMENT

Rohana Yusuf J:

Decision On Enclosure 20

[1] The petitioner's application in encl. 20, is made under r. 93 of the Companies (Winding up) Rules 1972, to reverse or vary the decision of the Official Receiver (OR) dated 28 January 2008 on proved debts. The OR had substituted an interest of 1.5% per month given by the judgment dated 20 January 2005 (based on an agreed interest) with an interest of 6% per annum on the debt proved.

[2] The judgment sum of RM167,017.62 together with a contractual interest rate of 1.5% per month was obtained against the defendant. Based on that judgment, the petitioner petitioned for the respondent to be wound up under s. 218 of the Companies Act and it was granted by this court on 19 January 2006. The petitioner filed its proof of debts in exh. LCW3 for a total sum of RM206,110.38. On 28 January 2008, the OR admitted the debt of only RM164,303.05 after capping the interest rate at 6% per annum instead of the 1.5% per month as per the judgment.

[3] Learned counsel for the petitioner Encik J.K. Phua (Encik Edwin Tan with him) contended that the OR was wrong in capping the interest rate to 6% per annum but should instead allow the contractual interest of 1.5% per month adjudged by the

court. He relied on r. 87 of the Companies (Winding Up) Rules 1972 (the Winding Up Rules) and contended that s. 291(2) of the Companies Act 1965 which incorporates the laws on bankruptcy is not applicable to determine interest rate on proved debt. This is because according to him s. 291 does not deal with "interest rate" specifically but only deals with proof of debts in the three following categories *viz*; respective right of secured and unsecured creditors, debt provable and valuation of annuities.

[4] He further contended that even though s. 291 deals with debt provable, it does not deal with interest on debt provable, and cannot be said to import the capping or imposition of interest on debt provable under the bankruptcy laws. In other words s. 291(2) of the Companies Act 1965 is not applicable when determining the issue of interest or rate of interest. Therefore according to him even in applying the law on bankruptcy, the rate of interest is not meant to be applicable. He argued that instead of s. 291(2) of the Companies Act, r. 87 of the Winding Up Rules should apply as the rule deals specifically with issue on interest in a wound up company. He further contended that even if in the event that s. 291 applies, there is a possible conflict between s. 291 and r. 87. In that event, r. 87 should be given precedence, based on the principle of *generalibus speilia derogant*, because r. 87 is a rule made specifically for winding up of a company.

[5] The OR represented by Federal Counsel Cik Noramirah binti Mohd Shafee and Cik Khamisah binti Khalid submitted that in allowing the proof of debt filed by the petitioner the OR relied on s. 291 of the Companies Act. Learned Federal Counsel contended that s. 291(2) calls into operation the bankruptcy laws in relation to all persons who would be entitled to prove debts. By virtue of s. 291(2) of the Companies Act, bankruptcy laws in particular s. 43(6) of the Bankruptcy Act should be applied in admitting the proof of debts. The learned Federal Counsel placed reliance on an unreported decision in *Re Foong Da Realty Development Sdn Bhd ex-parte Public Bank Bhd* (Company Winding up K28-31-2003). In rebutting the contention of the petitioner the Federal Counsel also cited the Singapore case of *Re City Securities Pte* [1995] 3 SLR 617 which applies bankruptcy laws in determining the cut off date for computing interest. The Singapore High Court in that case held that the combined effect of similar provisions of s. 291(2) which is s. 372 of the Singapore's Companies Act, with s. 40(3) of the Singapore Bankruptcy Act 1967 which is similar to s. 43(6) of the Malaysian Bankruptcy Act applies the bankruptcy law to

A determine the cut off date for the computation of interest. As the provisions of bankruptcy law applicable contains both cut off date, and the rate of interest, it is quite clear that the rate of interest in the bankruptcy law applies to the proved debts in a winding up.

B

[6] From the submissions of both parties, the following issues require the determination of this court:

(i) whether s. 43(6) of Bankruptcy Act 1967 applies to issue on interest of debt provable in a winding up;

C

(ii) whether r. 87 of Winding Up Rules remains applicable based on the maxim *generalibus speilia derogant*;

Application Of s. 43(6) Of Bankruptcy Act

D

[7] Under the Companies Act Part X deals with winding up of a company. Section 291 is on proof of debts. Section 291(2) provides as follows:

> Subject to section 292, in the winding up of an insolvent company
E the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and
F all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

G Quite plainly, s. 291(2) authorises the application of law relating to bankruptcy to all debt payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages, which will be admissible to proof against the company. In the same section, it is provided
H that the same rule shall prevail and be observed with regard to the respective right of secured and unsecured creditor.

[8] From these provisions it is clear that on proof of debts, the bankruptcy laws governing the individual, applies to a winding up
I of companies. The section that governs the proof of debts in bankruptcy law is s. 43(6) of the Bankruptcy Act 1967. Section 43(6) clearly caps the interest rate at not exceeding 6% per annum when it provides:

> Where a debt has been proved upon a debtor's estate and such debt includes interest or any pecuniary consideration in lieu of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding six per centum per annum, up to the date of receiving order is granted by the court.

[9] The said unreported decision of Ian Chin J in *Re Foong Da Realty Development Sdn. Bhd*, was brought to my attention by the Federal Counsel. I am in agreement with that decision and the contention by Cik Noramirah on this point, that s. 291(2) is the law to be applied for proof of debts and by virtue of the same, s. 43(6) of Bankruptcy Act comes into operation. Section 43(6) *inter alia* provides for the capping of interest rate in proof of debts to be at 6% per annum. Thus s. 291 read together with s. 43(6) becomes the law applicable to proof of debts and will have the effect of capping interest rate to 6% in a proof of debts in a wound up company.

[10] Coming back to the argument of the counsel for the petitioner that, s. 291(2) of Companies Act applies to merely "debt provable" and does not cover the "rate of interest" applicable to proof of debts, is untenable. This is because, the bankruptcy law relating to proof of debts in s. 43(6) essentially deals with two main matters on proof of debts. One, the capping of interest on proof of debts, and secondly, the cut off point of the computation date of the interest. Therefore, to say that the interest rate is not applicable to proof of debts when s. 291 authorises the application of s. 43(6) would tantamount to non application of the s. 43(6) at all. It is like saying that the whole s. 43 does not apply to winding up companies despite s. 291(2). To suggest that s. 291 applies to proof of debts but does not apply or deal with rate of interest on proof of debts, would cause havoc to the whole application of s. 43(6) mandated by s. 291(2). What then of that s. 43(6), that can become applicable?

Inconsistencies

[11] Having said that, I agree that r. 87 of the Winding Up Rules runs at odds with s. 43(6). The said r. 87 provides as follows:

> On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding up order or resolution, the creditor may prove for interest at a rate not exceeding six per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

Counsel for the petitioner contended that r. 87 applies basing on the maxim of *generalibus speilia derogant.* Learned counsel for the Petitioner cited the Appeal Court case of *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23 in support of his contention. This case was relied to contend that the court cannot read the word interest on proveable debt into s. 291 in absence of clear words used. In *DP Vijandran* the Court of Appeal was faced with the proper construction of s. 33(1) of the Legal Profession Act 1976 (LPA). Under s. 33(1)(h) LPA a Sijil Annual can be refused to an advocate and solicitor on the ground that the said advocate and solicitor "after having had an order of committal or an order for the issue of a writ of attachment made against him". The issue was whether the word "committal" includes "conviction". The Court of Appeal held that such word should be interpreted in real context and referring to a situation in which an advocate and solicitor has been punished for committing contempt. The effect of which is that, the Court of Appeal held that the Parliament in enacting s. 33(1)(h) LPA was contemplating a situation where the advocate and solicitor had been punished for continuing contempt of court, and cannot be construed to include a conviction. The word conviction should not be read into the section, thus an advocate and solicitor having had an order of committal should not be permitted to appear before court except for very good reason. It was then the Court of Appeal held that s. 33(1)(h) LPA must be construed *noscitur a sociis*.

[12] Quite different from the above situation, in applying s. 43(6) here, I am not reading the word "interest on proof of debts" into s. 291. It is a natural flow from the intention of s. 291 to apply s. 43(6) of Bankruptcy Act which deals with interest on provable debt. For this reason, I find that the rule of interpretation in *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23 does not apply and it is not a case on point here.

[13] Furthermore, s. 291 which incorporates s. 43(6) Bankruptcy Act cannot be said to be a general law as opposed to r. 87 being a specific law. Section 291 in fact, is a law that deals specifically with the proof of debts, and it authorises the application of s. 43(6) Bankruptcy Act and consequently, determines the capping of interest rate applicable. Thus I do not agree that the maxim *generalibus speilia derogan* applies here. It is not a case of a conflict between a general law and a specific law. It is a conflict between provisions in Acts of Parliament and a subsidiary legislation. That s. 291 of the Companies Act read together with s. 43(6) of Bankruptcy Act, would be inconsistent with r. 87 of Winding Up Rules. In reconciling this conflict I am of the view that, s. 23 of the Interpretation Acts 1948 and 1967, applies. Section 23 of the Interpretation Act provides:

> Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

[14] Thus r. 87 being a subsidiary legislation cannot override s. 43(6) of Bankruptcy Act which applies by virtue of s. 291 of the Companies Act both of which are provisions under Acts of Parliament. The OR has therefore applied correctly s. 43(6) of the Bankruptcy Act in determining the interest on provable debt to be capped at 6% per annum. Based on these reasons I therefore dismiss the application of the petitioner in encl. 20 with costs.

[15] Be that as it may, I urge the OR to look into tidying up these laws on proof of debts, to ensure a more effective implementation and avoid confusion to parties who seek to prove debts.